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Issues to Consider

WHEN NEGOTIATING

Your Company's

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D&O Coverage



Today,

directors and officers (Ds and Os) are very interested in the terms and conditions of their company's D&O liability insurance, and for good reason. In a relatively short span of five years, they saw the fall of Enron and WorldCom; comprehensive reform and legislation in the form of the Sarbanes-Oxley Act; heightened enforcement activity by the SEC and Department of Justice; the indictment and collapse of Arthur Andersen; intense scrutiny of executive compensation; and now, numerous lawsuits and investigations arising out of stock option backdating. Several high profile CEOs and CFOs have gone to jail, and in-house counsel have also been implicated.

In this environment, Ds and Os are frequently demanding outside legal review of their D&O coverage and are putting more pressure on in-house counsel and corporate risk managers to ensure the broadest possible coverage. The good news is that the number of shareholder class action filings is currently trending downward on an annualized basis and, as a result, the D&O insurance market is more competitive today than in years past. The following list is not exhaustive, but should assist you in reviewing and negotiating insurance protection for your company and its Ds and Os.

1. Understand the ABC's of the Insuring Clauses

The first step in negotiating D&O coverage should be to understand how your company's indemnification obligations work in conjunction with the insuring clauses of your coverage. First, set your D&O policy aside and research the law of indemnification and advancement in the state where your company is incorporated. You will likely find that certain claims and expenses are not legally indemnifiable, and that with respect to other claims—though legally indemnifiable—your company may refuse indemnification. For example, under the law of many states, settlements and judgments in derivative cases may not be legally indemnifiable. Moreover, indemnification and advancement may be merely permitted under the applicable state law, giving your company the discretion under the specified circumstances to fund indemnification, but not requiring that it do so.

Next, dust off your corporate bylaws and indemnification agreements, and obtain a basic understanding of the scope and limits of your company's formal grant of advancement and indemnification to its Ds and Os. Most companies include within the bylaws, a specific grant of indemnification to the fullest extent authorized by law and an express agreement to advance defense costs until such time as there is a final adjudication that indemnification is improper. Nevertheless, even where costs are legally indemnifiable and the given bylaws mandate indemnification, a company could still withhold indemnification and advancement of legal fees where it lacks adequate funds, is otherwise bankrupt and formally prohibited from funding indemnification, or where the decision makers—at the time—incorrectly determine that indemnification should be withheld on the basis that the individual D or O did not satisfy the requisite legal standard of conduct for permissible indemnification.

After you have reviewed your company's indemnification and advancement obligations, review the insuring clauses in your D&O policy. Insurance professionals speak a unique language of "Side A, B, or C insurance." The ABCs are coined from the three standard insuring clauses in a typical D&O policy:

- **Side A coverage**, styled as Insuring Clause 1 in some policies, refers to coverage that protects the assets of individual Ds and Os for claims where the company is not legally or financially able to fund indemnification.
- **Side B coverage**, styled as Insuring Clause 2 in some policies, reimburses the company to the extent it grants indemnification and advances legal fees on behalf of its Ds and Os.
- **Side C coverage**, or Clause 3 coverage, provides separate entity coverage for "securities claims."

All three coverage parts are generally subject to a single shared limit of liability. The limits of Sides B and C coverage are typically in excess of a large retention (ranging anywhere from \$500,000 to as much as \$10 million or more) that must first be funded by the company.

Carefully review any "presumptive indemnification" and other provisions in your policy concerning how the retention will be applied to a given claim. For legally indemnifiable claims, many policies state that the company's bylaws and resolutions are presumed to indemnify insureds to the full extent permitted by law. This means that the Side B retention may apply regardless of whether the company actually grants indemnification to an individual insured. If your company is legally permitted to indemnify an individual D or O but chooses not to do so, the individual defendant may be forced to fund his or her own defense up to the Side B retention amount before the insurer will step in and fund the defense costs.

2. Personal Conduct/Fraud/Profit Exclusion

Next, review the policy exclusions governing fraud, dishonesty, and illegal profit or advantage. These so-called conduct exclusions are implicated in nearly every D&O claim. A typical class action claim of securities fraud, for example, alleges that individual Ds and Os knew, or should have known, of misrepresentations in financial documents or other public filings. Recent claims involving backdating of stock options allege that certain individuals received the benefit of in-the-money option grants to which they were not legally entitled. In



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responding to notice of such claims, D&O insurers invariably send the insureds a formal coverage position, reserving the right to deny coverage on the basis of the conduct exclusions. The extent to which the reservation to deny coverage is a mere formality or ultimate reality depends upon the specific wording in your policy.

All conduct exclusions contain a "trigger" by which the insurer may invoke the exclusion. Some policies, for example, require a judgment or "final adjudication" adverse to the insured in the underlying action before the exclusion is triggered. With such wording, insurers should not be able to deny coverage in the absence of a final adjudication of fraud or illegal profit in the underlying lawsuit. This should also at least afford the insured coverage for defense costs, assuming other exclusions do not bar coverage.

Other policies require only that the requisite conduct occurred "in fact." Under such policies, the insurer may be able to rely on evidence of misconduct to deny coverage outright or otherwise leverage a greater

insured contribution to settlement. Certain newer policy forms further trigger the exclusion where the conduct occurs "in fact," as evidenced by an insured's written statements, documents, or admissions. Under some variations of this wording, insurers may point to testimony or admissions of *any* insured to deny coverage as to other insureds. The key issue here is whether the fraud or illegal profit attributable to one individual D or O can be imputed by the insurer to other individual Ds and Os or to the company. Fortunately, most policies contain a provision that states that the bad conduct of one individual insured will not be imputed to other individual insureds. Nevertheless, in many policies, excluded conduct of certain senior corporate executives may be imputed to the company for purposes of the Side B or Side C coverage. As a result, where the insurer can invoke the exclusion as to such individuals, it may deny coverage entirely or, for purposes of settlement, allocate and exclude a large portion of otherwise covered loss.

When negotiating the "trigger" to conduct exclusions in your D&O policy, give careful consideration to your company's advancement and indemnification obligations to its Ds and Os as outlined in articles of incorporation, by-laws, and/or written indemnification agreements. As noted in section 1, many corporate bylaws mandate

Ask yourself **how many** individuals qualifying as **“insureds”** in your D&O policy may themselves **be future plaintiffs or otherwise assist plaintiffs with future claims.**

advancement of legal fees to allegedly culpable Ds and Os until the wrongdoing is finally adjudicated. Unless the conduct exclusions similarly require a final adjudication of wrongdoing, the D&O insurer may be permitted under the policy to stop payment for, or on behalf of, allegedly bad actors short of a final adjudication, notwithstanding the fact that your company must continue advancing legal fees as a matter of corporate law.

3. Insured vs. Insured (I v. I) Exclusion

The I v. I was originally intended to exclude collusive or “friendly” lawsuits whereby insureds improperly attempted to shift business losses to their insurers. A financially troubled company, for example, might sue its Ds or Os to recoup business losses via an insurance settlement under the guise of a D&O claim for mismanagement or corporate waste. Insurers understandably do not want to insure collusive claims, or disguised business losses, under a liability policy. Unfortunately however, the I v. I in many policies today extends beyond circumstances of collusion, to exclude any claims that are brought by, on behalf of, or even with the assistance of anyone qualifying as an insured, regardless of whether the claim or assistance is for an improper or collusive purpose.

Many policies today have expanded the definition of those included within the definition of “insured.” In so doing, the number of claim scenarios implicating the I v. I has also increased.

Your policy likely includes past, present, and future Ds and Os of both the parent company and its subsidiaries as covered “insureds,” and may also include all current and former employees and in-house counsel for “securities claims.” Ask yourself how many individuals qualifying as “insureds” in your D&O policy may themselves be future plaintiffs or otherwise assist plaintiffs with future claims.

Depending on the language of the I v. I exclusion, shareholder claims brought with the assistance of a corporate

whistleblower, could be excluded from coverage. A claim brought by or with the assistance of a former director or officer could also result in a denial of coverage. A September 2006, *ACC Docket* article covers this topic in greater detail: See the “ACC Extras on . . . D&O Coverage” on pg. 96 for details.

When negotiating your D&O coverage, try to limit application of the I v. I exclusion to claims brought directly by the company. At a minimum, make certain that your policy includes the available market exceptions to the I v. I exclusion, which carve back coverage for:

- derivative claims;
- claims brought with the assistance or participation of corporate whistleblowers;
- certain claims brought on behalf of a company while in bankruptcy;
- employment practices claims asserted against individual Ds and Os;
- claims for contribution or indemnity between defendants in otherwise covered claims;
- claims brought entirely in a foreign jurisdiction; and
- claims asserted by former Ds and Os of more than four years.

4. Severability/Rescission Protection

Application severability and rescission risk might have been number one on our list in prior years, but the market today fortunately offers many adequate solutions to protect your Ds and Os against rescission. In reviewing your coverage, make sure you understand the rescission issue and carefully consider the various available endorsements. Many insurers offer multiple severability and non-rescission endorsements providing varying levels of protection.

So, what is the issue? In underwriting a given D&O insurance risk, insurers frequently evaluate the company’s financial statements and public filings. In the context of making investment decisions, security holders (i.e., potential plaintiffs) likewise evaluate a company’s financial condition and public disclosures. Where those financial statements and disclosures are materially misstated, Ds and Os face a simultaneous securities claim and rescission risk. At the same time, shareholders claim that they relied—to their detriment—on misrepresentations by the Ds and Os in making their investment decisions; the D&O insurers argue that the same misrepresentations fraudulently induced the issuance of the D&O policy. In recent years, your Ds and Os have probably read about this nightmare scenario, as the potential for rescission was an issue in many of the widely publicized corporate debacles.

The scope of information the insurer is relying upon is outlined in the definition of “application” in your policy; you should carefully review that definition and, when possible, narrow the scope to written information submitted to the insurer with the application.

Fortunately, non-rescindable coverage for non-indemnifiable (Side A) loss is widely available today. At a minimum, you should negotiate expressly non-rescindable coverage for those claims where the company cannot financially or is legally prohibited from granting indemnification.

The issue today concerns the degree to which corporate reimbursement Side B coverage and Side C entity coverage remains subject to rescission. Many markets will provide full severability as to Side B coverage, such that corporate reimbursement of innocent parties is protected from rescission. In other words, even where the insurer can void coverage as to certain individual Ds and Os, coverage remains to the extent the company continues to advance defense costs or otherwise provide indemnification to other innocent Ds and Os.

While most insurers impute the knowledge of certain senior executives to the company for purposes of Side C coverage, a minority of insurers will occasionally agree to a form of pure severability that does not impute the knowledge of any individual or corporate insured to any other individual or corporate insured.

Against a backdrop of numerous pro-insured court rulings on severability and rescission, some insurers have recently offered fully non-rescindable ABC coverage purporting to eliminate the rescission risk entirely from your D&O coverage. Don't be fooled by broad terminology. All endorsements purporting to provide non-rescindable coverage should be closely scrutinized. Pay particular attention to any new endorsement wording permitting a denial of coverage for misrepresentations in the application process that would have otherwise given rise to potential rescission.

5. “Follow-form” Excess Coverage

Most underwriting negotiations focus on terms, conditions, and exclusions in the primary policy. Don't forget to

ACC Extras on... D&O Coverage

ACC's 2007 Annual Meeting

Here is your opportunity to issue spot challenges and identify new insurance product offerings and trends with your peers. Register for ACC's 2007 Annual Meeting, October 29-31 in Chicago, and attend session 712: *D&O Insurance for Financial Services Lawyers*. You will be able to benchmark the most important elements to look for and negotiate in D&O insurance for a financial services firm. Register today at <http://am.acc.com>.

ACC Docket

- *Your Company's D&O Policy: Will the Insured v. Insured Exclusion Surprise You?* (2006). Think you know your company's D&O insurance coverage? Think again. Exclusions regularly contained in D&O policies may negate coverage that you and your entire team depend on. Find out which parties qualify as “insured” before you get caught in a loophole that may cost big bucks. www.acc.com/resource/v7525
- *Blowing Whistles and Climbing Ladders: The Hidden Insurance Issues* (2005). It's a Sarbanes-Oxley nightmare. An unhappy employee claims that she knows about certain accounting irregularities and is being persecuted for her whistle-blowing, and then posts her allegations online. Your CFO phones

asking about insurance coverage for being named personally in the suit—and you're going to be named, too. Does your coverage go far enough? www.acc.com/resource/v5716

- *State of the D&O Insurance Market* (2003). What you need to know to navigate the turbulent marketplace for director and officer protection. www.acc.com/resource/v877

Program Materials

- *Insurance 201: Specialized Policies for Specialized Problems* (2005). Lawsuits filed against corporations and their present and former directors and officers for purported misconduct have been on the rise in recent years. With claims alleging civil and criminal violations, breach of fiduciary duty, or internal business misconduct against the company or individual, how does an organization maximize insurance coverage for attorneys' fees and liabilities? www.acc.com/resource/v6867

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review coverage under your excess policies as well. It is a common misconception that excess policies follow-form to all of the terms negotiated in the primary policy.

While excess policies do typically follow many if not most terms and conditions contained in the primary policy form, they follow the terms of the primary policy “except as otherwise provided,” and some excess forms today do contain significant limitations on key provisions. For example, some excess policies include reliance endorsements that substitute representations and severability wording from that of the primary insurer. In that case, the excess insurer may have a greater ability to rescind coverage than your primary insurer.

Other excess policies include a provision stating that the insurer will not recognize payment by the insured in negotiated settlements with underlying insurers. As can be the case in negotiating large class action settlements, if the insured negotiates a buy-out of the primary policy at less than full limits, in the absence of negotiated wording to the contrary, the excess insurer may argue that the underlying policy has not been exhausted for purposes of excess attachment.

Many excess policies also include different prior and pending litigation exclusions and different claim-reporting provisions. The key here is to include your excess policies in the renewal negotiation process and be sure they dovetail with your primary placement.

ered an asset of the estate in the event of bankruptcy, and the limits of liability are not eroded by company claims.

Side A DIC policies may also be crafted to drop down and fund an individual’s defense where the company wrongfully refuses to advance defense costs otherwise subject to the corporate retention. Because legally indemnifiable claims are often subject to a large corporate retention where a company wrongfully denies advancement and indemnification to an individual insured, the drop down feature of Side A DIC coverage can prove invaluable. Although not exhaustive and subject to the actual negotiated terms, below are examples of the broader features and benefits provided as part of many Side A DIC policies:

- No “presumptive indemnification;”
- Specifically nonrescindable;
- Full severability of the application and conduct exclusions;
- Policy drops down as primary in the event of insolvency of the underlying carrier;
- Less restrictive fraud exclusion;
- No pollution or ERISA exclusion;
- Less restrictive I v. I exclusion;
- Covers Ds and Os where company refuses to indemnify; and
- Covers where primary policy has been deemed an asset of the debtor’s estate in bankruptcy.

Lawyers think in **terms of lawsuits**. When you receive a copy of a **complaint**, you intuitively know that **it should be reported** to the company’s **applicable insurers**.

6. Side A Difference-in-Conditions (DIC) Excess Insurance

Many companies today purchase Side A-only excess DIC coverage in addition to and on top of a tower of traditional insurance. Side A DIC coverage operates much like an umbrella policy, providing broader coverage terms and conditions than that afforded by the Side A insuring clause of traditional ABC coverage.

Specifically, Side A DIC policies may drop down and fill gaps in coverage for non-indemnifiable claims that are excluded by the traditional coverage. Side A DIC policies, for example, often do not include ERISA or pollution exclusions, and may have more favorably worded conduct and I v. I exclusions. Since the company is not insured under Side A coverage, such policies should not be consid-

ered an asset of the estate in the event of bankruptcy, and the limits of liability are not eroded by company claims. Side A DIC policy forms vary greatly from one insurer to the next, and the market for Side A DIC coverage is extremely competitive. Some forms include dedicated limits for independent directors. Other forms eliminate most, if not all, of the exclusions. You should work closely with your risk management team and broker to evaluate all of the available options.

7. Claim Definition and Claim Reporting

Lawyers think in terms of lawsuits. When you receive a copy of a complaint, you intuitively know that it should be reported to the company’s applicable insurers. But, what about a “frivolous” demand letter from plaintiff’s counsel? Or a letter from shareholder activists demanding changes to your company’s corporate gov-

Just think of the many ways a claim reporting deadline can be missed. An officer may decide to ignore a client's demand letter, or try to work it out on his own.

ernance? Do they too require prompt reporting to your D&O insurers?

The "claim" definition in most D&O policies extends well beyond formal complaints. So what happens when "claims" are not brought to the attention of corporate risk management or to the legal department until service of a formal complaint? In many jurisdictions, the insurer need not prove prejudice to establish a valid late notice defense. Written demands from shareholders or other parties may constitute a claim triggering a claim-reporting obligation, and the failure to timely notify the insurers of an initial written demand may jeopardize coverage for subsequently notified lawsuits.

Some policies require notice as soon as practicable after the claim is made against any insured. Just think of the many ways a claim reporting deadline can be missed. An officer may decide to ignore a client's demand letter, or try to work it out on his own. Or, a demand letter from plaintiff's counsel may sit in the in-box of in-house counsel under a stack of other urgent legal matters.

Many insurers will modify the notice condition to require notice only after the parent company's GC or risk manager first learns of the claim, thereby mitigating the concern that a claim, non-lawsuit or otherwise, may sit in some remote part of the company unbeknownst to your risk management team. Other insurers will narrow the notice condition, but include an absolute cut-off of 60-90 days after the policy period in which to report claims. In such cases, it is imperative that the insureds establish a claim reporting procedure so that all "claims" under the policy are brought to the attention of risk management sufficiently in advance of the reporting deadline.

The scope of your "claim" definition can also be outcome determinative in terms of your ability to recoup costs incurred in investigating or defending against the claim. Most insurers will not cover costs incurred prior

to the time an action, suit, or demand constitutes an actual "claim" as defined by the policy even if it ultimately benefits the defense of a covered claim.

Some policies, but not all, provide coverage for investigative costs incurred by a special committee in investigating shareholder derivative demands. Some policies may also extend defense cost coverage to certain regulatory and criminal investigations; however, many policies do not cover informal SEC investigations or costs incurred solely as a non-party witness. It is crucial to understand the scope of your "claim" definition and limitations of any claim-reporting condition.

8. Coverage for "Securities Claims"

Most public companies today purchase separate Side C entity coverage for securities claims or AB coverage only with predetermined allocation wording. The latter form of coverage does not afford any coverage for securities claims made solely against the company, but treats defense costs and other loss jointly incurred by the company and Ds and Os as covered loss.

Predetermined allocation

Even if your company is in the minority that does not purchase entity coverage, you will want to carefully consider how any predetermined allocation wording may be affected by the securities claim definition. Does coverage for "securities claims," and any predetermined allocation of the defense costs, disappear when individual insureds are dropped from the claim?

Individual insureds may have broader legal defenses than the company in many securities claims. In Section 11 claims under the Securities Act, for example, the company is strictly liable for misrepresentations in its offering documents, while individual Ds and Os who signed the documents are only liable if they failed to perform adequate due diligence. Make certain that the dismissal of individual Ds and Os will not result in the forfeiture of defense costs under your insurance.

Coverage for Section 11/12 Damages

You will also want to carefully consider the extent to which your coverage may or may not apply to securities claims arising out of public offerings of debt or equity securities. There is a growing debate concerning the extent to which a D&O policy extends coverage for damages arising out of initial public offerings of securities, particularly where such damages may be characterized as disgorgement or restitution of ill-gotten gain.

Your policy's definition of "securities claim" likely in-

cludes any alleged violation of the federal securities laws and may even specifically reference the Securities Act of 1933. However, a number of recent cases suggest that Section 11 and 12 damages—at least when paid by the issuer—constitute restitution or disgorgement and are uninsurable as a matter of public policy. Thus, even where your policy defines “securities claims” to expressly include alleged violations of securities laws governing initial offerings of securities, your carrier may take the position that damages paid in a settlement do not qualify as covered “loss” under the D&O policy.

Though your policy definition of “securities claim” may extend to all alleged violations of the securities laws, the “loss” definition in many policies expressly excludes from otherwise covered “loss” any amount deemed “uninsurable” under applicable law. Therefore, to the extent your jurisdiction considers issuer repayment of Section 11 and 12 damages to be restitution or disgorgement, there may be no coverage.

Though your policy definition of **“securities claim”** may extend to all alleged violations of the securities laws, the **“loss”** definition in many policies **expressly excludes** from otherwise covered “loss” any amount deemed **“uninsurable”** under applicable law.

Individual Ds and Os of course do not directly receive the proceeds of initial offerings. To the extent such individuals are making a settlement payment in the Section 11 or 12 context, there is a strong argument that such payment is not disgorgement or restitution and is therefore covered “loss” under your D&O policy.

In response to the recent court rulings, a number of insurers now offer contract wording affirmatively stating that the insurer will not assert that the portion of any settlement arising out of initial offerings of securities constitutes uninsurable loss, and expressly voiding certain exclusions in the context of IPOs or other initial offerings of corporate securities. If your company recently conducted a public offering of debt or equity securities, or plans to do so, you should include this issue in your coverage review and obtain clarification from your insurers where possible.

Secondary Liability Coverage

Whether your company purchases entity coverage or maintains predetermined allocation wording for “securities claims,” you should also confirm that the securities claim definition in your policy extends to secondary theories of liability such as 10b-5(a) or (c) theories of scheme liability, or SEC and state law exposure to claims of aiding and abetting. In many

D&O policies, the company and non-officer employees are only afforded coverage for “securities claims” arising out of the purchase or sale of the insured company’s securities.

Consider scenarios where your company may be sued by shareholders of another company for allegedly participating in a scheme to defraud or otherwise aiding and abetting a fraud on *that* company’s shareholders. Enron and World-Com shareholders, for example, also sued numerous investment banks as alleged scheme participants in the securities fraud. But, the issue of secondary securities liability may also be implicated in the context of ordinary vendor and sales agreements where your sales personnel enter into side agreements allowing business partners to improperly recognize revenue and cook *their* books.

The viability of 10b-5(a) or (c) theories of scheme liability is currently under review before the United States Supreme Court in *Stoneridge Investment Partners, LLS*

v. Scientific-Atlanta, Inc. Whether your company will ultimately be held liable to the shareholders of another company for such a claim, or under SEC or state law theories of aiding and abetting, to the extent your company purchases entity coverage for “securities claims,” you may wish to negotiate modifications to the definition to include all alleged violations of the federal or state securities laws including secondary theories of liability.

9. Employed Lawyers Insurance Coverage

Do you, as in-house counsel, need insurance coverage? Insurance professionals are asked this question several times in any given year. In-house attorneys were closely scrutinized in the Enron bankruptcy examination, and a few were also named defendants in the civil securities litigation. Numerous GCs have been implicated in the ongoing options backdating saga, with several under criminal investigation or indictment. The publicity afforded the in-house counsel’s role as a gatekeeper, positioned to detect and possibly prevent corporate fraud, has certainly heightened the general awareness of in-house counsel liability exposures. Fortunately, corporate employers have rarely brought direct malpractice claims against their in-house counsel. Nevertheless, in-house counsel liability exposure (particularly as to third

parties or government regulators) may be on the rise.

A typical D&O policy affords coverage only to duly elected or appointed Ds and Os. Even if the in-house counsel satisfies the policy's definition of director or officer—many GCs serve as corporate secretary for example—insurers frequently raise an issue of whether coverage extends to the attorney's rendering of professional services to the company in the capacity as a non-officer attorney. And, of course, many other in-house attorneys are frequently not duly appointed officers pursuant to articles of incorporation and governing bylaws.


For companies that purchase Side C coverage or pre-determined allocation for securities claims, all employees, including in-house counsel, should have coverage. Nevertheless, D&O policies are not typically crafted to address all in-house counsel liability exposures.

Some additional coverage may be extended by endorsement to the D&O policy, but you should make certain that any such employed lawyers extension to the D&O policy is in addition to, and does not take away, coverage that otherwise exists for all employees. Separate employed lawyers coverage may be purchased, with additional terms and conditions subject to negotiation. An April 2005 *ACC*

Docket article covers this topic in greater detail. See the "ACC Extras on. . . D&O Coverage" on pg. 96 for details.

10. Global D&O Requirements

Our final issue concerns the fairly recent discussion in the D&O underwriting community of global D&O indemnification and insurance and the need for locally admitted policies in certain foreign jurisdictions. Your company's D&O policy likely applies to claims asserted worldwide. However, certain countries maintain compulsory insurance requirements that could theoretically preclude your insurer from making payment to insureds located in foreign jurisdictions.

If your company has Ds and Os with significant liability exposure overseas, consider whether any D&O coverage must be procured locally. While the authors are unaware of any major D&O claims to date where the lack of a local policy precluded coverage under a traditional, US-purchased program, the issue has recently received greater attention as a matter of general corporate compliance. 

Have a comment on this article? Email editorinchief@acc.com.

Negotiating Policies Benefits Your Company

Keep in mind that D&O policies, both primary and excess, are not off-the-shelf, and many terms can and should be negotiated.

- **Start the renewal process early, leaving time for your broker to negotiate with several carriers.** Last minute requests for coverage enhancements are more likely to be denied.
- **Consider the benefit of in-house counsel and/or outside legal review.** To the extent your Ds and Os require outside legal review, allow sufficient time in advance of the renewal for outside counsel to thoroughly review the policies, prioritize areas of potential improvement to coverage, and review the findings with your risk management team.
- **Assess your specific risk exposures.** Don't fall into the trap of making assumptions about your company and its industry in light of historical exposures. Rather, each year include a review of your company's current and potential risks in your D&O renewal strategy discussions. For starters, review the risk disclosures and the management discussion and analysis portion of recent public filings. Outside analyst reports and/or rating agency evaluations can also help you frame your D&O renewal strategy.
- **Make sure your D&O broker is providing top-notch services.** The best brokers sell your risk aggressively into the market, proactively dictating coverage terms, conditions, and pricing to the market, rather than allowing such terms to be dictated by your insurers and then reacting to their terms.
- **Include all key parties throughout the renewal process.** In many companies, the risk management department has primary responsibility for D&O coverage negotiation and placement, but a number of other constituents play a significant role in the process. Some companies include board review of the D&O coverage, by committee or in a formal presentation to the board. The CFO or procurement department may have ultimate responsibility for the insurance purchase. The GC or in-house legal department may or may not play a role in upfront negotiation of coverage terms and conditions, but will invariably be required to understand them in the context of future claims. All of these parties have an inherent interest in understanding the scope of the D&O protection but are frequently engaged very late in the renewal process. Engaging key parties early in the process helps manage expectations both for policy renewal and when the claim arrives.